No. 89-1902

In The

Supreme Court of the United States

October Term, 1989

DENNIS E. PRYBA,
BARBARA A. PRYBA,
EDUCATIONAL BOOKS, INC.
and
JENNIFER G. WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

CORRECTED COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Reply to
United States Brief in Opposition

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POINT I

POST-TRIAL FORFEITURE HAS SERIOUS CONSTITUTIONAL IMPLICATIONS WHICH SHOULD BE ADDRESSED BY THIS COURT

The Government asserts that there is no need for this Court to address the constitutionality of post-trial forfeiture upon a conviction of obscenity since it has previously determined that obscenity violations may serve as predicate acts under state RICO laws. *Fort Wayne Books, Inc. v. Indiana*, ____U.S.____, 109 S.Ct. 916 (1989). Thus, because forfeiture is but a sanction imposed under a valid statutory scheme, any consequent, deleterious effect upon free speech has no greater a constitutional implication than the imposition of fines and imprisonment.

The Government's position reinforces the petitioners' belief that certiorari should be granted. Its denial will undoubtedly result in a plethora of RICO obscenity prosecutions and forfeitures since the Court will be deemed to have upheld, by implication, the viability of forfeiture. The legality of those forfeitures, in turn, will be endlessly disputed until this Court determines the matter. Since forfeiture has been imposed in *United States v. Pryba*, the several, significant constitutional questions posed upon imposition of that forfeiture are ripe for review.

Furthermore, while petitioners will agree that all sanctions imposed upon conviction of obscenity will result in some self-censorship and hinder, to some extent, the dissemination of adult

entertainment, the effect of that hindrance and the method by which it occurs must be analyzed with care. While the Court, in *Fort Wayne Books, Inc. v. Indiana*, upheld the criminal penalties under the Indiana RICO statute,[1] it noted that these sanctions were not "significantly different" from other punishments imposed upon obscenity convictions. Forfeiture *is* significantly different in the breadth of its application, the nature of the punishment and the effect it necessarily has on both the criminal defendant and those who wish access to adult bookstores. If forfeiture is affirmed, without even review by the Supreme Court, the widespread instances of RICO forfeitures upon obscenity convictions may quite conceivably result in the disappearance of "adult entertainment." That possibility alone illustrates that forfeiture, indeed, is not akin to lengthy terms of imprisonment or imposition of severe fines. The constitutional implications are not illusory nor are they insignificant. That being the case, the Government's position that review need not be undertaken because the result is no more onerous than those punishments which have been imposed in past, is untenable. Petitioners reassert that this case merits the Court's review.

POINT II

THE COURT WAS REQUIRED TO CONDUCT A PROPORTIONALITY REVIEW OF THE FORFEITURE OF PETITIONERS' INTEREST IN THE RICO ENTERPRISE

The Government asserts that the lower court was not required to conduct a proportionality review of the forfeiture of petitioners' assets as compared with the crimes of which they were convicted.

[1] Indiana civil forfeiture provisions are included in the State's Civil Remedies for Racketeering Activity (CRRA) statute. *See, Indiana Code*, §34-4-30.5-1, *et seq.* (1982 & Supp. 1987).

In support of this position, the Government asserts that the petitioners failed to make a prima facie showing that the forfeiture here may have been excessive. This position completely ignores the wealth of testimony elicited both during trial and at the forfeiture hearing. That testimony specifically revealed that the total "ill-gotten gains" generated from the sale or rental of the obscene materials which served as the basis for petitioners' conviction totalled $105.30 (TT-1707-1710; 1678-1682).[2] As a result, however, petitioners were ordered to forfeit the assets of five corporations including three bookstores, nine video rental stores, five vehicles, over 7,600 videotapes, all furniture, fixtures, machinery, computers, movie machines, equipment, and safes, as well as all bank accounts (A-164-167).[3] In addition, the records admitted at trial indicated that for the fiscal year ending 1986, the total sales from petitioners' expressive businesses amounted to $2,067,667.17 (TT-1409).

The stark contrast between the $105-figure and this large volume of forfeited property required the district court to review petitioners' claim that the interest ordered forfeited was grossly disproportionate to the offense committed and thus violated the Eighth Amendment. *See, United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). The Fourth Circuit is simply incorrect in holding (as it did in this case [A-17] and in *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir. 1988)), that a proportionality review need not be conducted when the sentence is less than life imprisonment without possibility of parole.

Secondly, the Government's claim that the forfeiture was not disproportionate, given the other, stringent penalties which could have been imposed, misses the mark. A proportionality review weighs the severity of the crime against the penalty invoked: that

[2] References to "TT" are to the trial transcript.

[3] References to "A" are to the Appendix to the Petition for Writ of Certiorari.

alternative sanctions could have been meted out by the trial court is totally irrelevant to the analysis. Here, on the basis of income from sales or rental of obscene material constituting .005% of the businesses' total sales or rental, the Government was able to shut twelve expressive businesses by confiscating all of their inventories of presumptively protected films and magazines as well as all of the neutral assets needed to distribute these materials. When the total forfeiture imposed in this case is combined with the fines and prison sentence imposed, the harshness of the penalty is clearly not proportional to the gravity of the offense.

POINT III

THE DEFENSE PROFERRED RELEVANT EXPERT TESTIMONY WHICH SHOULD HAVE BEEN ADMITTED AT TRIAL

The Government contends that the total exclusion of all expert testimony in this case was proper. First, it asserts that the defense-proferred survey failed to elicit information concerning community acceptance of the materials in issue. This position conflicts with the decisions of various courts (*see*, Petition for Writ of Certiorari, pp. 23-25) and fails to recognize the relevant issues sought to be explored.

Specifically, the survey inquired whether the interviewees believed they should be able to buy or rent materials depicting "nudity and sex" and whether adults who want to should be able to obtain and view such materials.[4] Answers to these questions would undoubtedly have revealed information relevant to a determination of the community's acceptance of such materials.

[4] "Nudity and sex" was defined as, "nude bodies in close up, graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers."

Moreover, contrary to the Government's assertion, the description of the materials as put to the interviewees mirrored the activities depicted in those materials. In fact, far briefer descriptions have been held sufficient to adequately apprise magistrates for purposes of issuing search warrants. *See, e.g., United States v. Christian*, 549 F.2d 1369, 1370 (10th Cir. 1977); *United States v. Marks*, 520 F.2d 913, 916 (6th Cir. 1975); *United States v. Pryba*, 502 F.2d 391, 410 (D.C. Cir. 1974). The survey questions proferred by the defense clearly revealed a valid attempt to convey the visual image of the materials to the interviewees and was sufficient to meet the law's relevancy requirements.

Secondly, the Government contends that the ethnographic study submitted by the defense was also properly excluded. This position fails to take into account a substantial body of precedent which establishes that *widespread* community availability of comparable materials is probative of community acceptance. *See, United States v. Various Articles of Obscene Merchandise, Seizuire No. 182*, 750 F.2d 596 (7th Cir. 1984); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2nd Cir. 1983); *United States v. 2,200 Paperback Books*, 565 F.2d 566, 571 (1977).

Indeed, the study at issue revealed a pervasive availability and consumption of sexually explicit materials within the relevant geographic area. Based upon the information he gathered, the expert determined that sexually-explicit materials comparable to those on trial were extensively distributed and purchased throughout the area. His findings of widespread availability and patronage of such works allowed the expert to assess contemporary community standards regarding the acceptance of the materials in issue and thereby permitted an inference of acceptance by the trier of fact. The exclusion of this testimony was improper.

POINT IV

TOLERANCE, NOT ACCEPTANCE, IS THE PROPER STANDARD TO BE APPLIED IN DETERMINING CONTEMPORARY COMMUNITY STANDARDS

Petitioners urge this Court to decide whether tolerance or acceptance is the proper measuring stick by which to determine community standards. Because the *Miller* test[5] is designed to ensure that, "the community [does not], where liberty of speech and press are at issue, condemn that which it generally tolerates," *Smith v. California*, 361 U.S. 147, 171 (1959) (Harlan, J., concurring in part and dissenting in part), petitioners assert that tolerance is the appropriate standard. Indeed, the First Amendment's toleration of speech, not necessarily accepted by the majority, is intrinsic to its existence. As explained by the Court in *Pope v. Illinois*, 481 U.S. 497, 500 (1987), "the ideas a work represents need not obtain majority approval to merit protection." By requiring an acceptance standard the Court of Appeals ruling, in effect,

[5] That test requires consideration of:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 25 (1973).

requires majority approval. Such a requirement unquestionably violates the very foundational principles of the First Amendment.[6]

POINT V

RESTRICTED *VOIR DIRE* DENIED PETITIONERS THE RIGHT TO EFFECTIVELY EXERCISE THEIR PEREMPTORY CHALLENGES

The defense and Government have polarized views about the extent to which *voir dire* was conducted in this case. What is clear is that the jurors were asked approximately seventeen questions during a morning session of the Court which began at 10:00 a.m. and was completed by lunch (TT-1017-1076). Strikingly apparent from the list of questions asked is the total absence of questions designed to reveal the juror's involvement in his community. In keeping with the Supreme Court's recognition that in an obscenity case it might be helpful to know how heavily a juror has been involved in the community, *Smith v. United States*, 431 U.S. 291 (1977), the defense requested that the trial court inquire into what community organizations the prospective jurors belonged. While the court asked the prospective jurors if they belonged to any organizations whose objectives were to promote or suppress pornography or allegedly obscene material, absolutely no inquiry was made as to the jurors' connection with any other type of community organization.

[6] The Government confuses the proper legal standard issue (tolerance v. acceptance of sexually explicit materials) with matters of proof regarding the availability or acceptability of sexually explicit materials in the community proferred to show what is tolerated. While it is true that the fact that various works are available does not necessarily mean they are tolerated, the defense experts provided proof beyond mere availability which showed toleration as well as acceptance of these materials. However, that is an evidentiary issue and does not address the correct legal standard with which the jurors must be charged.

Since the jurors were required to apply contemporary community standards to two prongs of the three-part obscenity test, this information was particularly crucial to the defendant's ability to gauge the jurors' knowledge regarding their community. Clearly, the right to exercise peremptory challenges is a hollow one when the defense has absolutely no information about the individuals deciding the defendant's fate. As the Supreme Court specifically recognized:

> Veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge their counsel has of them, which may include their group affiliations, in the context of the case to be tried.

Swain v. Alabama, 380 U.S. 202, 220-221 (1965). Unfortunately, in this case where affiliations and community contact are crucial to a juror's knowledge and application of community standards, the defense was bereft of pertinent information — a lack which impaired its ability to intelligently exercise the right to peremptory challenge.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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